Supreme Court, U.S.
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No. 90-1448

In The

Supreme Court of the United States

October Term, 1990

KENNETH ROBERTS,

Petitioner,

v.

KATHLEEN MADIGAN and ADAMS COUNTY SCHOOL DISTRICT NO. 50,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals follow established precedent and correctly hold that the School District did not violate the Establishment Clause when it asked a fifth grade elementary school teacher to remove sectarian books unrelated to the curriculum from his classroom and to refrain from reading from his personal Bible and leaving it on his desk during regular classroom hours when students were present?

2. Did the Court of Appeals follow established precedent and correctly hold that the School District's actions had a secular purpose, to assure that none of the teacher's classroom materials or conduct violated the Establishment Clause?

3. Did the Court of Appeals follow established precedent and correctly hold that the teacher's use of the Bible and presence of religious books in his personal collection had an improper religious purpose and had the primary effect of advancing religion?

4. Did the Court of Appeals follow established precedent and correctly hold that an elementary school teacher did not have First Amendment rights of free speech or academic freedom to have sectarian books unrelated to the curriculum in his personal collection of books for student reading or to read from his personal Bible and leave it on his desk throughout the school day when students were present?

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STATEMENT OF THE CASE

Petitioner's statement contains numerous misstatements of fact and material omissions. Respondents will address these misstatements and omissions.

A. Statement of Facts

1. Books In The Classroom

It is uncontroverted that *The Bible in Pictures* and *The Story of Jesus* were religious books. (Tr. 50) They were not related to the fifth grade curriculum and the teacher did not use them as part of any secular program of education. *Id.*

Contrary to Plaintiff's assertions, the two books in question were the only religious books in the classroom. The district court, after hearing the evidence, found that Roberts' classroom had only two religiously-oriented books. (App. 47a) The Court of Appeals agreed. (App. 21a) The teacher failed to introduce into evidence the content of any book he alleged was religious. By his own admission, Roberts testified he had a book on the life of Buddha because the class was working on an historical time line as part of the curriculum. (Tr. 34) He also admitted he talked about the religion of American Indians because Indian culture was part of the fifth grade curriculum. (Tr. 40-41, 51) Judge Finesilver and the Tenth Circuit found Roberts taught *about* Indian religion, and did not teach their religion. (App. 55a, 16a) This Court is bound by the district court and Court of Appeals determinations that the teacher failed to carry his burden of proof on this issue.

The principal, Kathleen Madigan, responded to a complaint initiated by parents.[1] She asked Roberts to

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[1] Contrary to the statement on page 4 of the Petition that one parent complained, the principal's testimony was that both parents expressed their concern. (Tr. 118)

remove the two books in response to concerns from parents. At no time did Roberts explain to Ms. Madigan how the religious books had a proper place in the approved curriculum. Petitioner has no reason to fault the principal's alleged failure to ask him how the books were being used, when to this date he has never provided a legally permissible reason for their use.

The principal asked the teacher to remove the two books because of concerns of separation of church and state. (Tr. 28) Her directive cited the need to avoid the appearance of teaching religion. (App. 55a) Ms. Madigan testified teachers could teach about religion if it was part of the curriculum. (Tr. 155)

In footnote 3 and on page 23 Petitioner notes that Ms. Madigan ordered Roberts to remove a poster from the classroom wall which stated "You only have to open your eyes to see the hand of God." What the petition neglects to reveal is that Roberts did not make the principal's directive an issue in the district court (App. 38a, n. 3), or in the court of appeals (App. 25a, n. 1).

2. Plaintiff's Bible

Roberts obtained his Bible by removing it from another elementary school library fourteen or fifteen years before this litigation. (Tr. 52) He admitted he left the Bible on his desk in his fifth grade classroom at all times. (Tr. 53-54) Roberts testified he read from the Bible during class time, and did so to model an adult reading to his

students. (Tr. 33, 53) His complaint made the same allegation (para. 11). The uncontradicted testimony of the principal was that elementary school teachers are role models, and elementary school children are impressionable. Ms. Madigan testified the teacher's reading a Bible at his desk served as a model to the children that Bible reading was something which was appropriate for them to do as well. (Tr. 150)

The students circulated around the teacher's room during the day, and could very easily have seen the Bible. (Tr. 156) There is no evidence the teacher attempted to conceal the Bible on his desk or when he was reading it. Nor is there evidence that Ms. Madigan instructed Roberts to "hide" his Bible, as asserted on page 5 of the Petition. Neither Roberts' testimony (Tr. 32), nor Ms. Madigan's testimony (Tr. 120) at trial corroborate this statement. In the previous school year, Ms. Madigan requested the teacher refrain from reading the Bible when he should have been teaching students. (Tr. 115-117)

3. Library Bible

At trial the parties agreed the library Bible would not be an issue when the School District said it would agree to replace the Bible, without admitting responsibility for its removal. (Tr. 13-15) Judge Finesilver noted the parties disputed whether Ms. Madigan removed the Bible from the school library, and that the Bible had not been replaced at the time he entered his order. (App. 40a) The district court did not find the principal removed the Bible, and concluded the school library did not show any preference for a particular religion. (App. 46a) The school

librarian testified Ms. Madigan never told her to remove any book from the school library, except on one occasion when a parent challenged the presence of a book in the library for non-religious reasons. (Tr. 89)

The library contained a children's Bible, as well as other books on Christianity. The dissent's statement that the principal insisted on the "obliteration" of all Christian books from the school premises was a gross misstatement and contrary to fact. The only person to have removed a Bible from a library in the School District was the Petitioner. (Tr. 52)

B. Course of Proceedings

Chief Judge Sherman Finesilver, after hearing testimony and argument of the parties, dismissed Plaintiff's case and entered judgment in Defendants' favor. He rejected Plaintiff's argument that the District's purpose in removing the two religious books from his classroom was to disapprove religious books in the school. He held, "The record reflects, however, that the district court's action was prompted by a secular, non-religious purpose." (App. 50a) He was persuaded that the District's purpose was to promote religious neutrality according to the mandate of the Establishment Clause.

Judge Finesilver also found that the record showed the District's actions regarding Roberts' Bible reading and leaving it in open view on his desk were also motivated by a secular purpose, performing its affirmative duty to ensure that individual teachers are not, through their

classroom conduct, violating the guidelines of the Establishment Clause. He held Ms. Madigan's order that Petitioner keep his Bible out of the view of students during the school day did not go "beyond insulating students from undue exposure to Roberts' religious belief." (App. 50a-51a)

Judge Finesilver also found in light of the record that Petitioner's conduct appeared to be motivated by religious purposes. (App. 51a) The religious books in his classroom were not used for any secular course of study and "Roberts never claimed that his personal use of the Bible was non-religious." *Id.* Finally, emphasizing the distinction drawn years before by this Court, the district court concluded Roberts' teaching American Indian religion was permissible, as it was teaching about religion as opposed to teaching religion. (App. 55a)

Petitioner's freedom of speech and academic freedom claims also failed. Balancing the teacher's right of free speech with the parents' and students' rights to be free of religious influence or indoctrination in the classroom, the court held the balance lay in the parents' and students' favor. (App. 57a-58a) He concluded that "Roberts cannot circumvent his own violation of constitutional limits by a misplaced claim of a violation of the right to free speech/academic freedom." (App. 55a)

The Court of Appeals for the Tenth Circuit affirmed. Judge McKay's opinion held the district court's conclusion that the School District had a secular purpose in taking the challenged actions was not clearly erroneous.

(App. 13a) The Court affirmed the finding that the District had a secular purpose, to ensure that none of Plaintiff's classroom materials or conduct violated the Establishment Clause. (App. 14a) The Tenth Circuit also rejected Plaintiff's argument that the removal of the two books from the classroom and disallowing the teacher to read from his Bible conveyed a message of disapproval of religion. It affirmed the district court's finding that the primary effect of the School District's actions was not to disapprove of Christianity, but to disapprove of teaching Christianity in the public schools. It therefore concluded the School District's actions did not violate the Establishment Clause. (App. 17a)

The Tenth Circuit also affirmed the district court's dismissal of Plaintiff's free speech/academic freedom claims. Applying the same test for Establishment Clause analysis, it also concluded that the teacher's actions violated the First Amendment and his conduct substantially infringed on the rights of the students. (App. 21a) It therefore concluded that the District's interest in eliminating possible constitutional violations outweighed the teacher's right to expression. (App. 21a)

SUMMARY OF ARGUMENT

The Tenth Circuit decision does not conflict with any other case, and follows established precedent. The School District acted lawfully, in accordance with its duty to maintain religious neutrality in an elementary school classroom setting. Its actions were reasonably undertaken to prevent violations of the Establishment Clause, and

these actions by themselves could not be Establishment Clause violations. This Court has reached similar conclusions in many earlier cases. Furthermore, no case has ever held that an elementary school teacher has an unfettered right to place religious books unrelated to the curriculum in an elementary school classroom or to display and read the Bible during regular classroom hours when students are present. Petitioner's actions were neither protected by the free speech clause of the First Amendment nor the concept of academic freedom.

ARGUMENT

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals Correctly Held The School District's Actions Did Not Violate The Establishment Clause, While The Teacher's Actions Did.

A. Importance of elementary school setting.

This Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. *Edwards v. Aguillard*, 107 S.Ct. 2573, 2577 (1987). The Court has even noted that displays of arguably religious symbols which might be constitutional when located on government property might raise additional constitutional considerations when located in a public school. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, ___ U.S. ___, 109 S.Ct. 3086, 3115, n. 69 (1989).

As the Court noted in *Edwards*:

> Families entrust public schools with the education of their children, but condition their trust

> on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary. [citations omitted]

107 S.Ct. 2573, 2577 (1987).

Decisions of this Court have recognized this distinction with respect to government-sponsored religious exercises that are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs. *Wallace v. Jaffree*, 472 U.S. 38, 81; 105 S.Ct. 2479 (1985) at 2503 (O'Connor, J., concurring).

The fact that this is an elementary school context makes heightened scrutiny of Establishment Clause issues even more important. The lower courts in this case followed decisions in other cases which have noted that elementary school children are more impressionable than high school or university students and "cannot be expected to discern nuances which indicate whether there is true neutrality toward religion on the part of the school administration." *Bell v. Little Axe Independent School Dist. No. 70*, 766 F.2d 1391, 1404 (10th Cir. 1985). That case and others have refused to extend this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981) to elementary schools.

Moreover, the activity that is the issue of this case concerns a teacher's conduct in the classroom during school hours when students were required to be present. This activity sharply contrasts with that in *Board of Education of the Westside Community Schools v. Mergens*, ___ U.S.

___, 110 S.Ct. 191 (1990). The activity in that case was sanctioned by a federal statute, occurred outside of school hours, and involved more mature high school students. Nevertheless, the Equal Access Act still permitted employees or agents of the school to attend only in a "non-participatory capacity." 20 U.S.C. § 4071 (c)(3).

As will be discussed throughout this brief, this case follows precedents in which this Court has upheld actions of school districts to avoid violations of the Establishment Clause of the First Amendment. The Petition essentially concedes this fact, and only attempts to convince the Court to accept the case by lifting portions of this Court's prior decisions out of context.

B. Duties of school districts to avoid Establishment Clause violations.

This Court has held on several occasions that school districts have an affirmative duty to ensure that individual teachers are not, through their classroom conduct, violating the guidelines of the Establishment Clause. *Levitt v. Committee for Public Education*, 413 U.S. 472, 92 S.Ct. 2814, 37 L.Ed.2d 736 (1973). More than forty years ago, this Court emphasized its reluctance to interfere with the decisions of local school boards, *McCollum v. Board of Education*, 333 U.S. 203 (1948), and has continued that policy of non-interference with the operation of public schools. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159 (1986). This case follows several cases in which this Court has upheld school districts' reasonable actions in discharging their duties to avoid violations of the First Amendment.

C. The School District's actions satisfied this Court's three-part test in *Lemon v. Kurtzman*.

This Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111 (1971) developed a three-part test for determining propriety of governmental action under the Establishment Clause. First, state action must have a secular purpose. Second, the primary effect of any state action must be one that neither advances nor inhibits religion.[2] Finally, state action must not foster excessive government entanglement with religion. Petitioner did not argue that the School District's action violated the third part of the test, therefore only the secular purpose and primary effects tests will be addressed.

1. The School District's actions had a secular purpose, while the teacher's actions did not.

Both the district court and court of appeals correctly held the School District's actions had a secular purpose, in ensuring that none of Roberts' classroom materials or conduct violated the Establishment Clause. The Tenth Circuit stated, "The only evidence relating to the school district's motives indicates that the district simply

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[2] Petitioner misstates part of the test at page 22, where he asserts government action violates the Establishment Clause if the principal or primary effect of that action "inhibits religion." In many instances throughout the Petition, the teacher ignores the fact that *advancing* religion is also prohibited.

wanted to prevent Mr. Roberts from violating the Establishment Clause." (App. 13a) These decisions followed several years of precedent from this Court.

The appropriate role of the state with regard to religious organizations is to be neutral. This Court articulated this concept in a Bible reading decision nearly thirty years ago, as follows:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

Abington School District v. Schempp, 374 U.S. 203, 226 (1963) (Brennan, J., concurring).

The lower courts' decisions that the District's actions had a secular purpose were correct and must not be disturbed.

Closely analogous to this case is *Breen v. Runkel*, 614 F.Supp. 355 (W.D. Mich. 1985). In *Breen* teachers, students and parents of students sued the state superintendent of public instruction, who allegedly directed school board members and administrators to stop religious practices in the school district. The plaintiffs alleged a constitutional right to read, pray and tell Bible stories in the classroom. The district court dismissed the complaint on the basis that the conduct of the teachers was constitutionally prohibited under holdings of *Engel v. Vitale*, 370 U.S. 421

(1962) and *Abington v. Schempp, supra*. The court held that whatever rights the teachers had, they did not extend so far under the First Amendment to permit teachers to pray or read the Bible in public school classrooms.

On page 13 of the Petition, Plaintiff quotes a portion of this Court's decision in *Stone v. Graham*, but omits the most significant point of the Court's opinion. If the full sentence had been quoted, Petitioner perhaps would have clearly understood why the very issues he seeks to have reviewed have already been settled by this Court's opinions. This is not a case in which the two religious books or the Bible were "integrated into the school curriculum" for Roberts' fifth grade class. This Court in *Stone*, in rejecting the state's argument that the purpose for posting the Ten Commandments on classroom walls was secular, stated:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. [citation omitted] Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the children to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.

Stone v. Graham, 449 U.S. 39 at 43 (1980).

The evidence quite clearly showed the following:

(1) the two religious books and the Bible were not integrated into the school curriculum and, indeed, had no role whatsoever in the fifth grade curriculum; (App. 20a, 51a)

(2) there was no claim that the religious books or display of the Bible in the presence of students had any role in the study of history, civilization, ethics, comparative religion, or the like in this fifth grade class; (App. 20-21a, 51-51a)

(3) the public display and availability of these religious books and public display of the Bible by Roberts served no educational function; (App. 55a, 56a, 17a)

(4) the placement of these personal religious books and Bible by Roberts in the fifth grade classroom "had the primary effect of communicating a message of endorsement of religion to the impressionable ten-, eleven-, and twelve-year-old children in his class." (App. 20a)

Roberts' display and personal reading of the Bible in the presence of his fifth grade students during class time did not meet the criteria for appropriate use of the Bible as found in *Schempp, Epperson v. Arkansas*, 393 U.S. 97 (1968), or *Stone*.

Petitioner still appears unable to distinguish between teaching *about* religion, which is permissible, and *teaching* religion, which is not. (App. 55a-56a, 17a) *Abington v. Schempp, supra*, 374 U.S. 225; *Stone v. Graham, supra*, 449 U.S. at 43; *Florey v. Sioux Falls School District*, 619 F.2d 1311 (8th Cir. 1980); *cert. denied* 449 U.S. 987 (1980). This

misperception permeates Petitioner's argument and eventually destroys it. The quotations in the Petition on the importance of study of the Bible attributed to *Abington* (p. 24); *Epperson v. Arkansas* (p. 13); *McCollum* (p. 14); and *Edwards v. Aguillard* (p. 18), all arose in the context of the permissibility of teaching *about* religion. They in no way require deviating from those principles in this case, since by his own admission, Petitioner was not using the three books as part of the school curriculum.

2. The primary effect of the School District's actions was not to inhibit religion, while the primary effect of the teacher's actions was to advance religion.

Both the district court and court of appeals found the primary effect of the District's action did not inhibit Plaintiff's religion. Petitioner's discussion of this issue is particularly narrow, and is exemplified by his misstatement of the *Lemon* test on page 22. The test prohibits "advancing" as well as "inhibiting" religion. This Court noted public school officials "must be certain, given the religion clauses, that subsidized teachers do not inculcate religion." *Lemon*, 403 U.S. at 619. The District's actions were reasonably undertaken to discharge that duty. Violation of the Establishment Clause need not be predicated on a showing of coercion. *Abington v. Schempp, supra*, 374 U.S. at 223.

Petitioner also grossly misleads the Court in his selective citation of *McDaniel v. Paty*, 435 U.S. 618 (1978). Justice Brennan's concurring opinion at page 641 stated "The Establishment Clause, properly understood, is a

shield against any attempt by government to inhibit religion *as it has done here;* . . . " Petitioner deliberately omitted the italicized language, and presented a totally misleading and overstated statement of the law. Ironically, Mr. Justice Brennan went on to warn against "zealots who would inject sectarianism into the political process . . . " 435 U.S. at 642.

The record was quite clear that Christianity was the only religion endorsed in Roberts' classroom, and the principal was justified in taking steps to ensure that religion was not forced on impressionable young students who were required to be present by state law. (App. 20-21a)

> When the power, prestige and financial support of government are placed behind any particular religious belief, the indirect coercive pressure upon religious minorities to the prevailing officially approved religion is plain.

Engel v. Vitale, supra, 370 U.S. at 430-431.

Petitioner states on page 15 of the Petition that "All that Ken Roberts did in the present case was to make this 'necessary' and 'worthy' information available, in a classroom library for optional, personal reading by students" and implies that such action is constitutionally protected. To the contrary, it is not the function of a public school teacher to make his personal religious books available to elementary school students during the regular classroom day. Parents have every right to object to such a practice. The Establishment Clause, as consistently interpreted by this Court, very clearly requires a school district to prohibit such actions by a teacher. *Engle, Schempp, Epperson, supra.*

Neutrality toward religion cannot automatically be equated with hostility toward religion, as Petitioner continually argues. In *Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), Judge Canby's concurring opinion best dissected the analytical flaws in the argument advanced by Petitioner in cases such as this:

> The analytical difficulty with plaintiffs' approach is that it tends to divide the universe of value-laden thought into only two categories – the religious and the anti-religious. By adopting this dualistic social outlook, and by denominating the anti-religious half of their universe as "secular", plaintiffs erect an insurmountable barrier to meaningful application of the Establishment Clause to controversies like this one.
>
> . . .
>
> It is apparent that so long as plaintiffs deem that which is "secular" in orientation to be anti-religious, they are not dealing in the same linguistic currency as the Supreme Court's establishment decision. If the Establishment Clause is to have any meaning, distinctions must be drawn to recognize not simply "religious" and "anti-religious", but "non-religious" governmental activity as well. In the parlance of *Lemon v. Kurtzman*, "secular" must mean "non-religious". Therefore, plaintiffs cannot succeed in demonstrating a violation of the Establishment Clause by showing that the school authorities are somehow advancing "secular" goals.

753 F.2d at 1536. See also, *Developments in the Law – Religion and the State*, 100 Harv.L.Rev. 1606, 1670 (1987).

The arguments in the previous section, as they address cases such as *Stone v. Graham*, are equally applicable to this part of the *Lemon* test. The lower courts

correctly held the lack of use of the books or Bible in the fifth grade curriculum undermined the teacher's argument of a secular purpose. Contrary to Petitioner's assertion on page 19, the School District was not attempting to apply a *per se* rule against Bible reading. Roberts was free to do so on his own time. By his own admission, he clearly could not do so while he was supposed to be teaching fifth grade students. (App. 20a, n.11)

Finally, despite Petitioner's request that the inquiry be focused on the relevant "context," *Lynch v. Donnelly*, 465 U.S. 668, 679, Petitioner's petition is totally devoid of the fact that the relevant context is a fifth grade elementary school classroom. We are dealing with highly impressionable ten- and eleven-year-old children, very easily influenced by their teacher. The fact that students were not required to read the books is not dispositive. As Justice Frankfurter addressed a similar argument:

> That a child is offered an alternative may reduce the constraint, it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children.

McCollum v. Board of Education, 323 U.S. 203, 227, cited in *Wallace v. Jaffree*, 105 S.Ct. 2479, 2492, n. 51 (1984); see, *Bell v. Little Axe Independent School Dist., supra*, 766 F.2d at 1404.

Petitioner completely ignores the interest of parents and students to be free from religious indoctrination. They have a right to expect that the public schools will uphold and implement the First Amendment's mandate

of religious neutrality, *Edwards, supra.* That is precisely what the principal and School District did in this case.

II. Petitioner's Conduct Was Not Protected By The Free Speech Clause Of The First Amendment Nor The Concept Of Academic Freedom.

Firmly established principles determine the outcome of this issue. In matters pertaining to the curriculum, boards of education have been accorded greater control over expression than they may enjoy in other forms of activity. *Board of Educ. v. Pico,* 457 U.S. 853 (1982) (school library); *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 108 S.Ct. 562, 568-70 (1988); *Kirkland v. Northside Independent School Dist.,* 890 F.2d 794 (5th Cir. 1989) (supplemental reading list not a matter of public concern). No case has ever held that a teacher has a constitutional or other right to teach what he sees fit, or to overrule parents' decisions as to which courses their children will take, unless the state has in some manner delegated this responsibility to the teacher. *Mercer v. Michigan State Bd. of Ed.,* 379 F.Supp 580, 586 (E.D. Mich. 1973), *aff'd mem.* 419 U.S. 1081 (1974); *Cary v. Board of Ed. Arapahoe Sch. Dist.,* 595 F.2d 535 (10th Cir. 1979).

A recent case closely analogous to this is the Seventh Circuit decision in *Webster v. New Lenox School District No. 122,* 917 F.2d 1004 (7th Cir. 1990). The plaintiff teacher sought injunctive and declaratory relief claiming his First and Fourteenth Amendment rights had been violated by the school district's prohibition from teaching a non-evolutionary theory of creation in the classroom. The

district court granted defendant's Rule 12(b)(6) motion to dismiss and the Court of Appeals affirmed.

Judge Ripple's analysis emphasized the case did not present a novel issue. He stated "We have already confirmed the right of those authorities charged by state law with curriculum development to require the obedience of subordinate employees, including the classroom teacher." 917 F.2d at 1007. The court rejected plaintiff's argument that the school board must permit him to teach what he pleases. Noting the First Amendment is "not a teacher license for uncontrolled expression at variance with established curricular content," *Palmer v. Board of Educ.*, 603 F.2d 1271, 1273 (7th Cir. 1979), *cert. denied* 444 U.S. 1026 (1980), the court concluded:

> Clearly, the school board had the authority and the responsibility to ensure that Mr. Webster did not stray from the established curriculum by injecting religious advocacy into the classroom.

917 F.2d at 1007.

The same rationale extends to this case. Plaintiff testified at trial that he wanted the right to read whatever book he wanted at any time. (Tr. 51) As previously argued, he clearly has no such right while teaching class. More importantly, here the books at issue are not even arguably related to any approved curriculum in the fifth grade at Berkeley Gardens School.

The Court of Appeals held the district court properly concluded that Petitioner's actions, when viewed in their entirety, had the primary effect of communicating a message of endorsement of religion. (App. 20a) It noted the

three books in question were the only ones in the classroom demonstrated to contain religious themes, and all pertain to Christianity. The Tenth Circuit, contrary to Petitioner's page 16 assertion, did not "single out" the two books for scrutiny. Petitioner singled them out by making them the only sectarian religious books in his personal collection, thereby generating the proper concern of parents and administrators. His use of the Bible, which he kept on his desk in full view of students, to model reading caused the principal to take proper action. Considering those factors in light of the environment of the fifth grade classroom, the Tenth Circuit affirmed the district court's ruling that the books have the "primary effect of advancing religion." It concluded:

> When viewed from the eyes of the children in Mr. Roberts' class, the placement of the two books in the class library, and the placement of Mr. Roberts' Bible on his desk, and Mr. Roberts' reading of the Bible during the reading period provided a "crucial symbolic link between the government and religion." *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 385 (1985).

(App. 21a)

Petitioner's attempt to label this an "academic freedom" case must also fail. On page 20 of the Petition he states "So long as the contents of the books are not harmful to students – as would be the case, for example with inappropriate sexual education materials or matters otherwise destructive of student morals – the teacher retains the academic freedom to maintain a collection of supplemental reading materials free from attempts to censor out books deemed 'unwelcome' because of religious content." There is no legal basis for allowing the

teacher to have two sectarian religious books unrelated to the curriculum as supplemental reading materials for elementary school students. The only authority Petitioner cites for this amazing proposition is part of Justice Brennan's concurrence in *Schempp*, which was made in the context of the permissibility of teaching *about* religion.

The cases previously cited in this section demonstrate that the concept of academic freedom cannot be stretched to cover the subject matter of this case. The boundaries of academic freedom are unclear, and one recent commentator has noted "Constitutional academic freedom should primarily insulate the university in core academic affairs from interference by the state, as opposed to protecting the individual teacher's autonomy." *Byrne*, Academic Freedom: A Special Concern of the First Amendment, 99 Yale L.J. 251, 253 (1989) [cited in *Miles v. Denver Public Schools*, 733 F.Supp. 1410 (1990)]. The same commentator concluded the concept of academic freedom is essentially meaningless in the elementary and secondary school settings, where the primary purpose is to inculcate values in students, and not to indulge in research and the free flow of ideas. *Byrne, supra*, at 288, n. 137.

The context here is a *fifth grade classroom*; a claim of academic freedom to make the two sectarian books available to fifth grade students and a right to display and read his Bible in the presence of those students is illogical and without legal foundation.

The Court of Appeals for the Seventh Circuit rejected nearly identical arguments to those raised by Petitioner in *May v. Evansville-Vandenburg School Corp.*, 787 F.2d 1105

(7th Cir. 1986). Plaintiff claimed the school district's denial of teacher requests to hold prayer meetings on school premises abridged their rights of academic freedom and free speech. The court's opinion stated that the only issue of academic freedom was the right of a public school to operate without interference from the federal courts. It further stated:

> Teachers do not exercise academic freedom when they meet before school opens for a prayer meeting from which students are carefully excluded. They pursue in this setting personal ends unrelated to their role as teachers. They may have limited First Amendment rights but not by virtue of being teachers, and those rights do not include the use of school premises for unauthorized meetings unrelated to teaching.

787 F.2d at 1112.

Petitioner commingles arguments based on alleged students' rights. Students' rights were not an issue in the Tenth Circuit because it affirmed the district court's decision on standing (App. 18a) and are not an issue in this Court because the other plaintiffs did not appeal.

Finally, this Court, in *Edwards v. Aguillard, supra,* recently emphasized courses in public schools were prescribed by the state and teachers were not free, absent permission, to teach courses different from what was required. It stated "Academic freedom at least as it is commonly understood, is not a relevant concept in this context." 107 S.Ct. at 2579, n. 6.

Roberts' actions, if purely personal, do not fall within the concept of academic freedom. If supposedly related to teaching, they violated the Establishment Clause.

III. The Court Should Not Grant The Writ, As This Is A Rare Case.

As previously discussed, very few cases in which the Establishment Clause has been an issue have occurred in elementary schools. To the extent those cases exist, courts have emphasized that the lesser maturity and greater impressionability of elementary students require school districts to take extreme care in preventing Establishment Clause violations. This case does not require the exceptional action of judicial intervention into the affairs of elementary schools. To the contrary, it is one in which established precedent was and must be followed.

CONCLUSION

In view of the foregoing, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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